APPENDIX A

AFFIDAVIT OF COUNSEL
IN SUPPORT OF
PETITION FOR REHEARING

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

J. B. Tietz, being first duly sworn, states:

1. I am counsel of record in this captioned case and was counsel for petitioners in all courts below, trial and appellate.

2. I started practicing law in Ohio, in 1926; and, at all times since 1944 have practiced in my present office at 257 South Spring Street, Los Angeles, California.

3. Since 1944, and for 25 of the last 27 years I have specialized in draft and related military problems, nearly all of these clients claiming conscientious objections to war and to military training.

4. During this 25 year period I have followed the procedures of the eleven armed services (the four regular, and the seven reserve and guard organizations) as carefully as possible, on matters concerning my clients.

5. In 1968 DoD 1300.6[1] was amended in two chief particulars: (1) to take away the initial decision on a man's conscientious objections from his immediate commanding officer and (2) to afford him the opportunity to have private counsel: ". . . The applicant will then be afforded an opportunity to appear in person (with counsel retained by him, if he desires) before an officer in the grade of 03, or higher, who is knowledgeable in policies and procedures

1. The Department of Defense Directive referred to in *Ehlert*.

relating to conscientious objector matters. The designated hearing officer will not be an officer in the applicant's chain of command."

Prior to this amendment, and from the beginning of the Vietnam armed involvement reports came to me from many military installations that DoD 1300.6 was being entirely disregarded, as follows: "An officer took me aside and said 'I'm giving you a friendly tip: the policy here is to grant no c.o. discharges. You are up against a stone wall.' I learned he was telling me the truth."

From 1968 to date my aid to in-service men has included appearing with them at such hearings, ones now universally termed "the 03 hearing."

6. Samples of my experiences are:

a. Most recently, on April 20, 1971, I appeared with and on behalf of Dr. Ralph Hannah at the Armory in Pasadena, California. The hearing officer was an infantry colonel[2] and the four other officers present were either infantry or other non-legal (Judge Advocate General) men, hereinafter referred to in this affidavit as JAG officers. Each was in uniform like the Hearing Officer.

The Hearing Officer was directly on the applicant's chain of command. He answered one of my questions, as follows: "No, this is the first such hearing I have attended."

I was forbidden to use my *tape recorder*[3] and was told, "No, you will not get a *copy of my report.*"[3]

b. On April 22, 1971, I was at Fort Ord, Fort Ord, California with and on behalf of PFC Martin Rush, a "Native American" that is an Indian from the historically peaceful Pima tribe.

2. Underscoring denotes a violation of the DoD.

3. Italicizing denotes a grave unfairness.

There I encountered three[4] young JAG officers all sitting as a panel and was told "No, *you cannot use the tape recorder.*"[3]

c. On December 2, 1970 I was at a lawyer's office in Pasadena, California with Lt. Max Bothwell.

The Hearing Officer was an infantry colonel: the man who had appointed him was a colonel in chemical warfare; both were in dress uniform, as was an infantry major. All were in applicant's organization and/or chain of command.

I was *forbidden to use my tape recorder* (it being explained "This would inhibit freedom of expression."); I was told "You *will not get a copy* of my report."

This was the most extraordinary one I have attended in that 95% of all the hearing officer said was in this vein: "You are a most intelligent young man; the army needs you; you can do much for the service if you stay in."

d. I have attended hearings (all since the 1968 amendment, of course) where situations comparable to the above were present such as one at Fort Lewis, Fort Lewis, Washington, where the hearing officer was an infantry major and forbade the use of a tape recorder, one at the Marine Aircraft Wing near Santa Ana, California where the Marine Corps major was a non-legal officer and in the chain of command but did permit recording.

e. Where the Hearing Officer is favorably impressed, and so declares in a detailed report (with corroborating support in the form of many unimpeachable letters) the applicant still can encounter an abrupt and arbitrary denial of relief by a superior officer, a man who never saw him. See cases cited in Point I, above.

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4. Underscoring denotes a violation of the DoD.

> Where relief is thereafter obtained at the trial level [by a persistent soldier and one able to get a lawyer's aid] such cases are generally unreported. For example Bernie Reynolds had a most favorable Hearing Officer report, and a dozen letters from priests and nuns but had to file a petition, in San Francisco, to get his writ of habeas corpus. No. 51576 N.D. Cal.

7. Concerning the sabotage of the initial version of DoD 1300.6. Several clients, from different military installations informed me, during the period beginning in 1966 up to the middle of 1968: An officer said to me I'll give you a tip. You are in a blind alley. The policy here is to turn down all these c.o. applicants.

8. The Central Committee for Conscientious Objectors is an organization largely of Quakers, and one that has had the respect of all concerned: Pentagon, Selective Service System, historic peace churches, etc. It has had a vast quantity of experience in these conscientious objector matters for a generation. In its publication "Handbook, for Conscientious Objectors, Eighth Edition, Third Printing, December, 1966, on page 82 re DoD 1300.6:

> "Although many men were discharged on grounds of conscience during 1964 and 1965, since the spring of 1966 virtually all applications have been denied regardless of merit."

In its Ninth Edition, Second Printing, January, 1968 it saw no reason to alter the above statement and repeated it verbatim.

In its Eleventh Edition, September, 1970 it reported "About 70% of the applications for noncombatant status and about 20% of the application for CO discharge are approved. Some unsuccessful applicants are discharged on other grounds." On page 93.

Evidently, the 1968 Amendment to the DoD improved the situation. What brought about the amendment and what were its new provisions?

1. Whereas, in 1964 and 1965 "many" of applicants for an AR 635 20 discharge were successful Pass the Word reduced it to denials of "virtually all applications" in 1966 and 1967.

2. This sabotage, and the attendant outcry and pressure brought the 1968 DoD 1300.6 amendment. *Thereafter* (1) the applicant's commanding officer was not to be his hearing officer; (2) a knowledgeable officer, 03 (captain) or higher was to be the hearing officer and (3) the applicant could have private counsel at the 03 Hearing. These changes clearly meant that the Department of Defense wanted the applicant to have a fair hearing.

/s/ J. B. Tietz
J. B. Tietz,
Attorney for Petitioners

Sworn to before me and subscribed in my presence this 18th day of May, 1971.

/s/ William A. Leeds
(Seal) Notary Public in and for the County of Los Angeles, State of California

SUPPLEMENTAL AFFIDAVIT.

This supplemental affidavit is to further show that the current practice of the military is to proceed without legal advice and, in consequence, to ignore the many court decisions interpreting the DoD 1300.6 and its progeny, in this instance the controlling Marine Corps Order, termed M.C.O. 1306.16B.

On May 22, 1971 affiant represented Pfc Elmer Ray Kent at his 03 Hearing at the Marine Air Base, Yuma, Arizona.

The Hearing Officer was a non-legal man (an aviator); also, he was in the chain of command. The "non-legal but aviator fact" was established by the insignia I observed on his lapels and by the way he signed documents that are now part of Kent's conscientious objector application for separation; the "chain of command" fact was his statement to me during the hearing.

The Hearing Officer also stated to me he would "use the chaplain's report and recommendation and the psychiatrist's report and reasoning."

> [This is not permissible: In the case of U.S. ex rel.-Greenwood v. Resor (4th Cir., No. 15,392, April 12, 1971), the Court pointed out that AR 135-25 para 7b, expressly directs that neither the chaplain nor the psychiatrist should make a recommendation for approval or disapproval of an application for CO discharge. Thus the Court could "give no weight to the recommendation of either officer and we disregard whatever weight they were given by the Review Board."]

Also, he stated he would use, as his standard for judgment, Selective Service Systems Dr. Tarr's standard of "training with rigor." This standard is false; there is no justification in the Act or in *Welsh* for this. It was issued, by the Director [LBM 107 6/July '70 Tarr] right after he was upset by the *Welsh* decision of the Court, June 15, 1970.

We were originally told that this hearing would be at the El Toro Marine Corps Base, a large installation with a legal department. No explanation was given for the change, or why a legal officer wasn't present.

On May 27, 1971 I received a telephone call from Kent and he read me the rejection recommendation of the 03 Hearing Officer: it was based on the incongruity of a man claiming conscientious objection to war when the record showed he had been convicted of possessing marihuana. It incorrectly stated he had been selling it, incorrect in other respects and most important, this and all other items were not mentioned at the 03 Hearing and we didn't know they were being considered. Copy of the Hearing Officer's report is attached. Copy of Kent's letter to affiant is also attached. Attention is invited to Kent's statement that the Hearing Officer interviewed him *before* the Hearing, in absence of counsel, and in defiance of the regulation and fairness. We refer to ¶5 of Kent's letter to affiant:

> "(5) He brings up many things which were not even covered in the hearing which came from conversations we had had before. The whole copy seems to revolve around this rather than the actual hearing."

An affidavit from Kent will be procured, one rebutting the report, if and when further pleadings are in order.

On May 29, 1971 the text of the report and recommendation of disapproval came. It was based on "insincerity". If supported by "demeanor" or by recited, pertinent facts the report would be on solid ground.

There is no mention of demeanor by word or in inference and the facts were immaterial ones such as (1) a conviction on a marihuana charge [partly incorrect]; (2) paper work late, including his letters of reference and, most important *none* of these items were related to us at the hearing and when I questioned the Hearing Officer at the conclusion of it whether he believed the applicant had been frank the officer said "Yes".

I had started the proceeding with his permission, and on my statement "We have the burden and, with the Hearing Officer's approval I will proceed with our case", and, after I covered everything, the officer asked almost no questions.

At the close he said, "You have covered everything" and then went into some generalities.

/s/ J. B. Tietz
J. B. Tietz

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Sworn to before me and subscribed in my presence by J. B. TIETZ, personally know to me, on May 31, 1971.

/s/ Edward Raiden
(Seal) Notary Public in and for the County of Los Angeles, State of California.

A9

COPY TO KENT

1:JTi:hr
1330
25 May 71

SECOND ENDORSEMENT on Private Elmer R. KENT's ltr 1:JBM:jcp over 1330 dtd 19 May 71

From: Captain James B. MCKENNEY (SSN 425 78 69 65) MSN 09 54 43/1501, USMC

To: Commanding Officer, Marine Training Squadron 103

Subj: Conscientious Objector Status; request for

1. Returned.

2. It is recommended that Private KENT's application be disapproved.

3. On 23 May 1971, Marine Corps Air Station, Yuma, Arizona, a hearing was conducted with Private Elmer R. KENT and Mr. J. B. Tietz (Attorney at law) present. Private Kent was afforded the opportunity to support his application.

4. It is felt that Private KENT's application is insincere. His application comes at a time when he is awaiting trial by Special Court Martial for an eleven month unauthorized absence. He was arrested 1 October 1970 by civilian authorities for possession of marijuana, selling marijuana, and possession of dangerous drugs. He was tried and convicted on 23 December 1970, served a ninty day sentence and is on three years probation. He stated that he had planned to return and apply for a conscientious objector status but was arrested. Although he claims to have started on the paper work prior to arrest, all his letters of reference are dated after 20 November 1970. It is felt that

while in civilian custody, he decided to apply for this status as a means of evading court martial.

5. Private KENT professes to believe that everyone is God and all people should love each other. His belief was derived from a vision that he witnessed over a year ago on a rainy morning in El Toro. Also he stated that he can no longer perform any job in the military.

6. The Chaplain and Psychiatrist also believe that KENT's application is insincere and a means of getting out of military service.

7. It is further recommended that the Convening Authority proceed with the trial of Private KENT.

J. B. MCKENNEY

27 May 1971

Mr. Tietz,

Here's the copy. I want to go to court with this. I'm confident that I'll be able to pay you your fee. I'm already working on that now.

There are some things which bother me about this copy.

(1) He states that he feels my application is insincere He said at the hearing that he felt I was sincere.

(2) He brings up my civil case stating that I was arersted for Pocess. Maraj., Sales of Maraj. and pocess dangerous drugs. There was no sales involved—that was an intent to sell charge—besides it was dropped and so was the pocess dangerous drugs. I feel he's slighting me here and building ground for prejudice against me.

(3) A remark about my claiming to have started my application prior to arrest. I have my receipts and things which you gave me at the time I first came to visit you.

(4) I was not tried and convicted on that civil charge. I was black mailed and coerced into a plea of guilty.

(5) He brings up many things which were not even covered in the hearing which came from conversations we had had before. The whole copy seems to revolve around this rather than the actual hearing.

(6) "His belief was derived from a vision that he witnessed over a year ago on a rainy morning in El Toro." I did not derive my belief from that. That was only a conformation or understanding. Sort of like the key that opened the door. Also I don't believe I said rainy morning because it was at night and I don't think it was raining. I believe I stated that it occured about the the same time of year as when Calif had that storm which caused rain for 13 days straight.

That's about all I can think of right now. When you reply can you give me some idea of the length of time—(like a tenative time table) for this proceeding. That will give me a frame work to work with in on financing this. I believe I can collect the money soon.

Thank You

/s/ Elmer R. Kent

P.S. They were supposed to have my hearing at El Torro. There was supposed to be a Colonel as the 0-3 and some other people were going to sit in. I learned this from Capt. Suciu my military defense counsel. He doesn't know why it was cancled. Perhaps a mistake was made. I'll check.